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No. 90-1087

IN THE  
SUPREME COURT  
OF THE UNITED STATES  
OCTOBER TERM, 1990

KENDRIX M. EASLEY,  
*Petitioner*

v

THE UNIVERSITY OF MICHIGAN ET AL.,  
*Respondents*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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**QUESTIONS PRESENTED**

- I. IS THERE A CONFLICT BETWEEN THE SIXTH CIRCUIT'S DECISION AND THE DECISIONS OF THIS COURT OR THE OTHER CIRCUITS?
- II. DID JUDGE FEIKENS ABUSE HIS DISCRETION IN REFUSING TO RECUSE HIMSELF?

## **RULE 29.1 STATEMENT**

The Regents of the University of Michigan is a constitutional body corporate created under Michigan Constitution 1963, Art 8, §5. It has no parent or subsidiary companies.

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## **RESPONDENT'S BRIEF IN OPPOSITION**

Respondents, Regents of the University of Michigan and six individual members of its faculty and administrators (jointly referred to as the "University"), respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") in this case. The opinions are reported at 906 F.2d 1143 (6th Cir. 1990) and 853 F.2d 1351 (6th Cir. 1988).

## **STATEMENT OF THE CASE**

Plaintiff Kendrix Easley ("Easley") was a law student at the University of Michigan Law School. In August 1983, after earning 80 credit hours (1 credit hour short of the 81 credit hours required for a J.D. degree), Easley was suspended from the Law School for one year when he was found guilty of plagiarism. Despite the fact that he still had the opportunity to earn one more credit and his J.D. degree, on November 21, 1984, Easley filed suit in the United States District Court for the Eastern District of Michigan ("District Court") claiming he was wrongfully deprived of his J.D. degree.<sup>1</sup>

## **STATEMENT OF THE PROCEEDINGS**

As discussed below, Easley made numerous unsuccessful attempts to have the District Court Judge, John Feikens, disqualified. The University prevailed in the District Court and Easley appealed to the Sixth Circuit. The Sixth Circuit affirmed the dismissal of Easley's claims but remanded the case for purposes of enlarging the record on Judge Feikens' alleged affiliations with the University. The District Court on remand found Judge Feikens to be impartial and the Sixth Circuit affirmed. Easley is

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<sup>1</sup> The University adopts the discussion of the facts contained in the Sixth Circuit's opinion (Pet. 6a-8a) as its counterstatement to Easley's view of the facts in his Statement of the Case.

now asking this Court to grant certiorari to review this determination of impartiality.

### **The District Court**

In the original trial, Easley first moved to disqualify Judge Feikens under 28 U.S.C. §§144 and 455, claiming that Judge Feikens should recuse himself because of his associations with the University of Michigan Law School and “his well publicized Negrophobia”. Judge Feikens denied the motion. (Pet. 1a).<sup>2</sup> The Sixth Circuit then denied Easley’s petition for a writ of mandamus directing Judge Feikens to disqualify himself. Easley later filed in District Court a second motion to disqualify and also a motion for a new trial in front of an unbiased judge, which were denied by Judge Feikens. *Easley v. University of Michigan Board of Regents*, 632 F.Supp. 1539 (E.D. Mich. 1986).

### **On Appeal to the Sixth Circuit**

On appeal, the Sixth Circuit found no error in the District Court’s disposition of Easley’s equitable and legal claims. (Pet. 11a). With respect to the denial of the motions to disqualify, the Sixth Circuit held that it had previously determined that the statements relied upon by Easley in claiming racial bias arose from Judge Feikens’ judicial experience and did not evince racial animus or justify recusal. (Pet. 13a). Easley is not seeking review of this holding in his petition.

In response to Easley’s “Emergency Motion to Accept Further Evidence of Judge John Feikens Flagrant Conflict of Interest”, the Sixth Circuit held that the fact that Judge Feikens graduated from the University of Michigan Law School would not cause a reasonable person to question his impartiality and that the affiliations of Judge Feikens’ adult sons with the Law School were

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<sup>2</sup> References to (Pet. ) are to Easley’s Petition for Writ of Certiorari. References to R are to the Trial Docket number of a document or pleading. An identifying word after the document number is added where the numbers are inexact.

“patently insufficient to call into question Judge Feikens’ own impartiality under §455.” (Pet. 15a).

The Sixth Circuit, however, remanded the case to District Court Judge Barbara Hackett to (1) enlarge the record regarding the nature of Judge Feikens’ associations and affiliations with the Law School, its faculty and administrators; (2) determine whether Judge Feikens acquired extra-judicial knowledge of matters material to this controversy; and (3) determine whether, because of such associations, Judge Feikens’ impartiality in this matter might “reasonably be questioned.” (Pet. 17a-18a).

### **On Remand to the District Court**

*The Proceedings on Remand.* On remand, Judge Hackett required Judge Feikens to submit an affidavit regarding his affiliations with the University of Michigan. Judge Hackett also narrowed the means of discovery to interrogatories and requests for production of documents in order to protect the parties from unduly burdensome discovery. (R98; R114).

Easley served seven sets of interrogatories and two requests for production of documents on the University (R95; R115; R97; R100 St Antoine; R101 Eklund; R102 Munroe; R104 Pooley; R106; R107 Westen). Plaintiff also served interrogatories for Lillian Fritzler, a University employee. (R99).

The University responded to all these requests but filed objections to some of the discovery requests and asked for a protective order. Easley filed a motion to compel the discovery unanswered by the University. (R112; R116). The District Court granted the protective order and denied the motion to compel because the discovery requested was irrelevant, and Easley had failed to show that he was being denied access to pertinent material. (R133; R134).

The University reported that they would not call any affirmative witnesses at the evidentiary hearing scheduled by Judge

Hackett. (R129). Easley filed a witness list describing the testimony of each intended witness in one of the following ways:

Testimony unknown, failed to answer discovery.

Testimony will discuss Judge Feikens' numerous associations and affiliations with the University of Michigan and his intimate involvement in the operations of the Law School.

Testimony will discuss Judge Feikens' involvement with the University of Michigan. (R135).

The University served interrogatories on Easley asking (1) the substance of questions to be addressed to each witness, (2) through which witnesses Easley would establish the allegations of bias, (3) what Easley intended to establish by the testimony of each Defendant, and (4) which of the facts established through discovery that Plaintiff intended to contest. (R143). Judge Hackett ordered Easley to answer the interrogatories. (R157).

On the morning of the evidentiary hearing, Easley gave Judge Hackett a motion for reconsideration of her order requiring Easley to answer the University's Interrogatories. (R161). At the hearing, Judge Hackett asked Easley *18 times* to proffer some specific fact that he wished to present, a fact that he wished to contradict, a fact that he wished to ask a witness or Defendant about, or a fact which would support his allegations. (R161: p.9, 1.20; p.10, 1.14; p.11, 1.16; p.12, 1.3; p.12, 1.24; p.13, 1.12; p.17, 1.16; p.18, 1.23; p.19, 1.22; p.20, 1.18; p.21, 1.8; p.22, 1.3; p.22, 1.22; p.25, 1.5; p.25, 1.15; p.27, 1.16; p.28, 1.1; p.30, 1.150).

Each time Easley responded with a generality that the affidavits were false and the affiants lying; or argued that he was the victim of improper procedure, i.e., unresponsive and incomplete discovery, need for depositions and admissions, irregular opening statements, etc., or that all would be disclosed on cross-examination. (R161, *supra*).

Judge Hackett finally told Easley that she was prepared to rule on the present record unless he offered something more than

the general allegations of lying. Easley stated that he had "already expressed the facts he had." (R161). Judge Hackett subsequently issued written "Findings and Conclusions" where she stated that the record regarding Judge Feikens' affiliations with the Law School had been enlarged and the parties provided an opportunity to state their positions; examination of witnesses was not permitted at the evidentiary hearing because Easley was not able to identify a single fact in dispute, other than his conclusory allegations that all documents provided were false and that all involved in this matter had lied; nothing in the record supported a finding that Judge Feikens acquired actual or constructive extra-judicial knowledge of matters material to the Easley case; and nothing in the record supported a finding that Judge Feikens' impartially might reasonably be questioned, other than Easley's conclusory allegations. (R160).

*The Record Developed on Remand.* The record developed in the proceedings on remand showed that Judge Feikens served as a volunteer fundraiser for the University of Michigan Law School Fund in 1964, some 20 years before the hearing in this matter. (Pet. 31a; R110). No evidence was presented to suggest that Judge Feikens ever served on the Board of Governors of the University Fund. (Pet. 32a; R110). Judge Feikens is an active member of the University of Michigan Club of Detroit through which he participates in social events related to athletics. (Pet. 32a).

The record also showed that Judge Feikens did not have a close association with any of the six Law School faculty and administrators to whom Easley sent interrogatories. One had never met Judge Feikens (R131 Westen, No. 11), and one had never seen Judge Feikens other than during the trial of this matter. (R124 Munroe, No. 9). The other four candidly disclosed where and when they had encountered Judge Feikens at professional or public events, and the substances of any conversations. (R119 St. Antoine, Nos. 9-12; R123 Eklund Nos. 9, 13-14; R127

Pooley Nos. 6, 10-13). Dean Sandalow had the closest association, having once gone to the Feikens home for dinner.<sup>3</sup>

The record showed that Judge Feikens had continuously been a member of the Law School Committee of Visitors from 1981 to the present, and that the purpose of the committee is social and informational. (Pet. 31a-32a). In 1984, the year prior to the commencement of this lawsuit, the Committee had 205 members, the three day meetings consisted of informal social events and visits to classes, and formal business meetings and small group discussions of admissions, financial aid, curriculum and faculty research. (R111, pp. 1-14). Materials sent to all attendees consisted of reports about the subject for group discussions. (R111, pp. 17-123).

The record further showed that the faculty and staff at the Law School made no communication to the Committee of Visitors or others regarding this case. Disciplinary matters are confidential to those persons having some role in the matter and the Faculty Committee for Professional Responsibility. (R110; R123 Eklund, No. 21; R127 Pooley, No. 18; R131 Westen, No. 18). Moreover, Judge Feikens did *not* attend the Committee of Visitor meetings in 1985 during the pendency of this case before him. (Pet. 32a; R111, No. 17). *It was absolutely uncontroverted, therefore, that Judge Feikens received no extra-judicial communications regarding this case through his affiliation with the Committee of Visitors or elsewhere.*

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<sup>3</sup> Contrary to Easley's assertion in his Petition (Pet. 14), Dean Sandalow was not a dinner guest of Judge Feikens during the pendency of this lawsuit. In his answers to Easley's interrogatories Dean Sandalow detailed the nature of his contacts with Judge Feikens between 1983 and 1987. He stated that from 1983 to 1987, his contacts with Judge Feikens were limited to correspondence and meetings (with 41-55 others present) regarding the Law School's Committee of Visitors, participation as a party in *Picozzi v. Sandalow*, and professional functions or "around town." (R110 Sandalow, No. 14). His contacts with Judge Feikens between 1983 and 1987 did not include a dinner at Judge Feikens' house.

### **Sixth Circuit**

After District Court Judge Hackett issued her findings, the parties filed supplemental briefs in the Sixth Circuit. In his brief, Easley raised several procedural issues regarding the remand proceedings but did not address the substantive issues regarding Judge Feikens' impartiality.

The Sixth Circuit concluded that the procedural issues raised by Easley did not have the "slightest merit." (Pet. 28a). The Sixth Circuit then concluded upon reviewing the District Court's findings of fact and conclusions of law that Judge Feikens did not abuse his discretion in refusing to recuse himself. (Pet. 28a-29a).

## REASONS FOR DENYING THE PETITION

### I. THERE IS NO CONFLICT BETWEEN THE SIXTH CIRCUIT'S DECISION AND THE DECISIONS OF THIS COURT OR THE OTHER CIRCUITS.

Easley asserts that the Sixth Circuit's opinion "deviates significantly" from decisions of this Court and previous decisions of the Sixth Circuit and raises a "conflict with current authority." However, Easley fails to identify even *one* decision of this Court or any other court which conflicts with the Sixth Circuit's opinion.

Instead, the Sixth Circuit, consistent with the string of cases cited by Easley, held:

Recusal is mandated...only if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. *See Trotter v. Int'l. Longshoremen's & Warehousemen's Union*, 704 F.2d 1141 (9th cir. 1983).

(Pet. 28a-29a). The differences, if any, between the Sixth Circuit's opinion and the opinions of other courts relate to differences in factual situations.

Rather than demonstrating a real conflict, Easley is actually arguing that the District Court, both initially and on remand, made erroneous findings of fact and that the Sixth Circuit improperly affirmed these erroneous findings of fact. In his Petition, Easley argues that Judge Feikens had ex parte communications with one of the Defendants. (Pet. 18). The District Court on remand, however, found that there was no evidence that Judge Feikens acquired any actual or constructive extra-judicial knowledge of matters material to this controversy through his various associations with the University and its Law School.<sup>4</sup> Easley, therefore, is simply arguing that the Sixth Circuit decision

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<sup>4</sup> Easley's discovery showed that any ex parte communications between the Defendants and Judge Feikens did *not* concern or involve any discussion of Easley or this litigation.

below was erroneous. He has not shown that it is vital that the issue regarding Judge Feikens' impartiality be decided finally by this Court.

The decision below turns solely upon the facts in this case, i.e., did Judge Feikens obtain extra-judicial knowledge of material matters, what was the nature of his contacts with the University, were those contact sufficient so that a reasonable person would have factual grounds based on objective appearances to doubt the impartiality of the judge. The outcome of this case, because it turns on its own facts, will affect few other than Easley. Easley is simply asking for another level of review to review evidence and discuss the specific facts of this case. This clearly does not warrant the grant of certiorari and Easley's petition should, therefore, be denied.

## **II. JUDGE FEIKENS DID NOT ABUSE HIS DISCRETION IN REFUSING TO RECUSE HIMSELF.**

The Court has long required precaution against abuse in charging a judge with bias and against the unresponsibility of unsupported opinion. *Berger v. United States*, 255 U.S. 22, 33 (1920). A judge is presumed to be qualified, and a party has a substantial burden to show grounds for believing the contrary. *In re Union Leader Corp.*, 292 F.2d 381, 389 (1st Cir. 1961).

The Sixth Circuit remanded to the District Court to enlarge the record in order to determine whether Judge Feikens had abused his discretion in refusing to recuse himself pursuant to 28 U.S.C. §455, which states:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

In this case, Easley has repeatedly made totally unsubstantiated allegations charging Judge Feikens with bias. Contrary to the assertions in Easley's petition, Easley had the opportunity to develop a "full. . . record of the basis for disqualification." In fact, Easley was afforded *two* opportunities to develop and produce evidence of grounds for recusal: first in the initial proceedings before Judge Feikens, and later in the remand proceedings before Judge Hackett.

Easley took advantage of these opportunities and on remand conducted quite extensive discovery by serving seven sets of interrogatories and two requests for production of documents. Judge Feikens also provided an affidavit setting forth his associations with the Law School. While Judge Hackett limited the *means* by which Easley conducted discovery, he clearly was not denied discovery on the issue of Judge Feikens' impartiality. He also was given the opportunity to present any relevant evidence on this issue. He was prevented from presenting witnesses at the evidentiary hearing but only because he failed 18 times in response to Judge Hackett's questions to identify a specific fact he wished to present, a fact he wished to contradict, a fact he wanted to ask a witness about, or a fact that would support his allegations. Despite all these opportunities, Easley failed to offer any *evidence*, both to Judge Feikens before the appeal, and on remand to Judge Hackett, to substantiate his "unsupported opinion" that Judge Feikens should not be presumed to be qualified to hear this case.

In response to Easley's discovery requests, the individual Defendants candidly detailed their associations or nonassociations with Judge Feikens. Not one of the Defendants has a close association with Judge Feikens. Their associations generally arose from being members of the same legal profession in the State of Michigan.

In addition, Judge Feikens' "affiliations" with the Law School are tangential as a matter of law. Judge Feikens' affidavit states that the Committee of Visitors of the University of Michigan Law School serves essentially a social and informational function. The number of committee members, the number of

attendees, and the agenda of activities produced in response to Easley's discovery all corroborate this characterization of the Committee by Judge Feikens.

Likewise, Judge Feikens' membership in the University of Michigan Club of Detroit, essentially a social club, suggests nothing more than an amicable feeling a judge may have toward a wide range of community institutions which may be litigants. *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 11 (1st Cir. 1981).

His 1964 fundraising activity for the Law School Fund, even if it were significant, was too remote in time to require recusal. *United States v. Story*, 716 F.2d 1088, 1089 (6th Cir. 1983). Easley failed to establish and Judge Feikens denied membership on a Board of Governors of the University of Michigan Fund. (Pet. 35a).

The evidence was also uncontroverted that none of the Defendants discussed, or had occasion to discuss, the Easley matter with Judge Feikens. It was further uncontroverted that any discussion of the Easley matter outside of the Faculty Committee for Professional Responsibility (the committee hearing the matter) would be contrary to Law School policy. This evidence, and the evidence that the University abided by the policy, corroborated Judge Feikens' affidavit statement that he received no extrajudicial knowledge of the matters material to this case. (Pet. 33a-35a). Easley offered no evidence, aside from bald assertions, to rebut this conclusion.

Judge Feikens volunteered by affidavit disclosure of all his associations with the Law School, its faculty and administrators. Easley had an opportunity to ask Defendants and others all of the relevant questions he desired. Easley had the opportunity to bring other witnesses and evidence to present to the District Court on remand to rebut the evidence disclosed through discovery, but he failed to do so. The record below clearly reflected all of Judge Feikens' relations with the University, the Law School and its personnel. There clearly was no evidence of personal bias or

prejudice or of personal knowledge of disputed evidentiary facts concerning the proceedings.

The record also clearly shows that all of the Judge Feikens' contacts with the University, the Law School and its personnel were not sufficient to cause a reasonable observer to doubt Judge Feikens' ability to pass impartially on the issues raised by Easley. Recusal is required even if a judge lacks actual knowledge of facts indicating his bias or interest in the case only if a reasonable person knowing all of the facts would expect that the judge would have actual knowledge. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The fact that Judge Feikens and his sons graduated from the University of Michigan Law School, that the Judge participates in a club and a committee for basically social purposes, that the Judge raised money for the Law School Fund over 20 years ago, and that the Judge contributes money to his alma mater would not cause a reasonable person knowing *all* the facts to expect Judge Feikens to have actual knowledge of the Easley matter. The Sixth Circuit correctly held, therefore, that Judge Feikens did not abuse his discretion in denying Easley's motion.

## CONCLUSION

For the reasons stated above, Respondents respectfully request this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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